



every step of the way



# Granny Cams in Long-Term Care: Rights, Responsibilities and the Law

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# *Reasons Why Families Might Seek to Use Granny Cameras*

1. To check-in on loved ones
2. To confirm or deny potential abuse
3. To monitor care

# *Reasons Facilities Might Want to Promote the Use of Granny Cameras*

1. Give family members/residents peace of mind
2. Marketing – promote quality of care and reputation
3. Improve staff training and monitoring
4. Eliminate/minimize abuse and neglect allegations and claims

# *Reasons Facilities May NOT Want to Allow 'Granny Cams'*

1. Employee morale and concerns
2. Increase in potential claims of abuse or neglect against the facility
3. Increased costs for monitoring and regulating – Wi-Fi access
4. Resident privacy concerns
5. HIPAA concerns
6. Publicity and social media
7. Hacking

# *The Current Law in New Jersey on the Use of Granny Cameras*

- No directly applicable Statutes or Regulations in New Jersey
- No known pending legislation in New Jersey

# *Prior New Jersey Legislation Introduced and Dead - A-3883 (Nov. 2014)*

*A nursing home resident, or authorized representative thereof, may actively monitor and record the resident's in-room treatment, care, and living conditions, by engaging in authorized electronic monitoring*

## Definitions:

"Nursing home" means any institution, whether operated for profit or not, which maintains and operates facilities for the extended medical and nursing treatment or care [for] of two or more nonrelated individuals who are suffering from acute or chronic illness or injury, or are crippled, convalescent, or infirm and are in need of such treatment or care on a continuing basis. Infirm is construed to mean that an individual is in need of assistance in bathing, dressing, or some type of supervision.

"Authorized electronic monitoring" means the placement of an electronic monitoring device in the immediate living quarters of a resident, whether in a visible or hidden location, and the use of such device to record or actively monitor the resident's in-room treatment, care, and living conditions, following the submission of requisite notice and consent forms to the nursing home administrator.

"Electronic monitoring device" means a video surveillance camera, audio recording device, or other electronic device that is capable of being used to record or monitor events taking place in a resident's room.

- Can be requested by resident only (if competent), or authorized representative ( if not competent)
- Recording may be audio or video
- Facility is released from liability for violation of resident's privacy rights
- Include separate consent forms for roommates. If a roommate refuses, the nursing home shall facilitate transfer to a separate room, within a reasonable period of time
- Facility must make reasonable physical accommodations to facilitate resident's use
- Administrator shall post a sign at entry points identifying that electronic monitoring may be taking place
- Limited the video/audio being admitted as evidence in a judicial proceeding, unless it shows the time/date, has not been edited or enhanced, and the transfer is accomplished by a qualified professional
- Violations subject nursing home or administrator to an administrative penalty and possibly a disorderly persons offense

# *The Law in Other States*

States that specifically permit granny cameras by statute if requested by resident or family:

1. Texas
2. New Mexico
3. Washington
4. Oklahoma
5. Illinois
6. Maryland
7. Virginia
8. Utah

# *Common Themes Amongst Statutes*

- All of the States with Statutes give the resident or family member the option - not the facility
- Applies to skilled nursing, assisted living and other long-term care facilities
- The resident/family member is responsible for the cost
- No covert devices/monitoring
- Consent of roommate is required
- Signs and posting regarding use of cameras
- Retaliation for use of camera/monitoring is prohibited

# *How Do the Other 42 States Handle Use of Granny Cameras?*

- Approximately 15 States have introduced (attempted) legislation:
  - Alabama, Arkansas, Florida, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, NEW JERSEY, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and West Virginia.
- Many have no policies or regulations.
  - LTC facilities are free to implement policies of their own choosing.
- Difference between audio and video recording
  - Generally not unlawful to record video
- Some states have regulations/policy guidance
- Pennsylvania: 55 Pa. Code 2600.42(s)
  - Residents may video record in their private rooms or with the written permission of all roommates in shared rooms.
  - Residents may install “hidden cameras” in private rooms without the home’s knowledge.

# *Whether to Allow Granny Cameras: Practical Considerations*

1. Privacy – Residents, and Employees
  - HIPAA – Use of audio creates risk of sharing confidential healthcare information
2. Creation, implementation and adherence to policies
3. Marketing – Both with permitted use and prohibition
4. Reputation
5. Claims and liability
6. Costs – Accommodating infrastructure to support cameras
7. Controlling access and who authorizes use and cessation
8. Notice
9. Rooms – Shared rooms and roommate
10. State and Federal wiretapping laws – criminal and civil ramifications for audio recording
  - New Jersey (NJSA 2A:156A-3 and 4): One party consent state
  - Federal (18 USC 2511(2)(d)): One party consent

# Privacy

- Employee
  - No law in New Jersey restricting employers from recording employees
  - Provide notice to employees. Include in employee handbook
  - Social media – residents or families posting video/audio recording. Defamation claims.
- Resident
  - Identifying who authorizes and has access
  - Confidential communications with staff, medical personnel
- Roommate rights
- Bathing, changing, toileting, etc.
- Visitors
- Notice

# HIPAA

- The Privacy Rule standards address the use and disclosure of individuals' health information—called “protected health information” by organizations subject to the Privacy Rule — called “covered entities,” as well as standards for individuals' privacy rights to understand and control how their health information is used.
- Healthcare providers – nursing homes, assisted living facilities, long-term care facilities are “covered entities”.
- Audio recordings may result in a breach of the privacy rule by the facility. The use of granny cameras with audio recording creates liability for a breach of protected healthcare information.

# Granny Camera Policies

- Policies should be implemented authorizing or prohibiting the use of electronic monitoring. Include in:
  - Resident agreement
  - Employment handbooks
  - Post policy in a conspicuous place at the facility
  - Agreements with vendors/providers
  - Granny camera usage policy

# Marketing/Reputation

## A. Permitting granny cameras

- Effective marketing tool for prospective residents
- Improves reputation/reliability of facility
- Allows family members to monitor care
- Minimizes abuse/neglect – actual and claims
- Difficulty attracting employees?

## B. Prohibiting granny cameras

- Negative publicity
- Questions by residents, family members and community

# Claims and Liability

- Impact that the policy will have on number of claims
- Access that facilities have to granny camera recording
- Whether permitted use will impact success in defense of claims
- Impact that policies will have on claims
- Violations of State and Federal wiretapping laws
- HIPAA breaches

# Costs

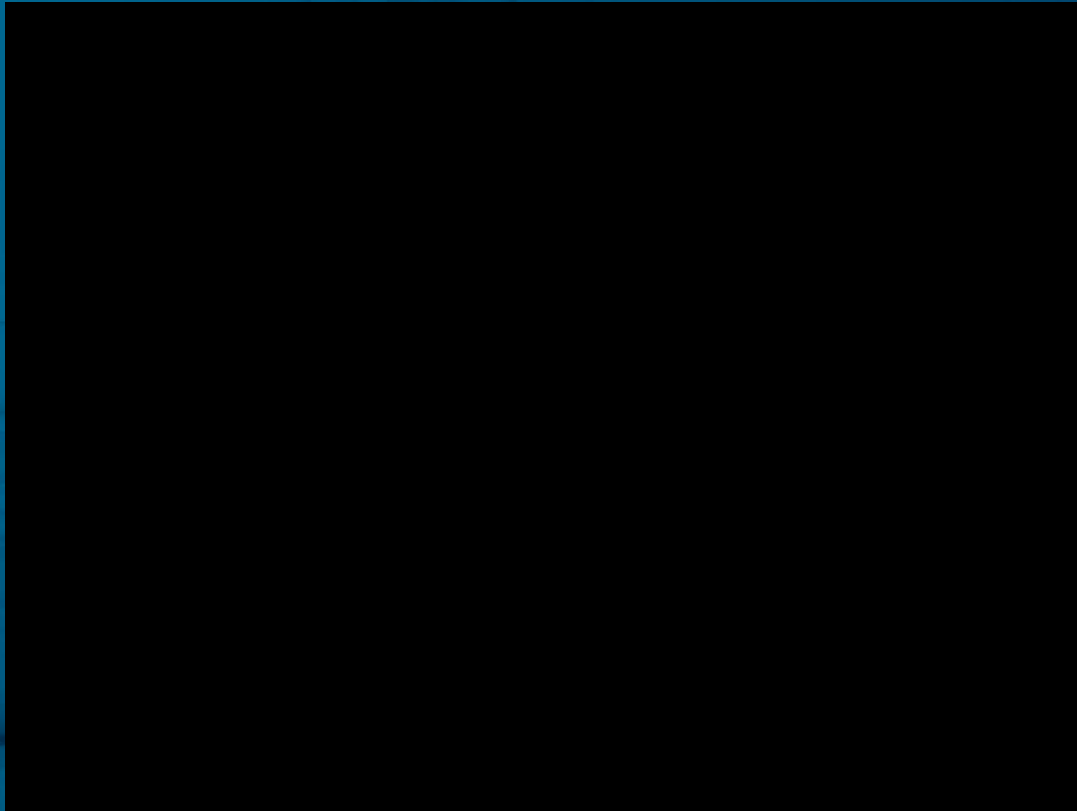
1. Who pays for the granny camera?
2. Costs for accommodating: power sources, internet access and Wi-Fi
3. Preparation, implementation and enforcement of policies
4. Claims
5. Marketing, reputation and publicity

# Authorization and Use/Notice

- Authorization
  - Who decides on the use – resident or family member
  - When does a family member have appropriate authorization and interplay with HIPAA and estate planning (powers of attorney, healthcare proxies, guardianship/conservatorship)
  - Granny camera policies
  - Restricting use
  - Roommates – Authorization of roommate/limited scope of recording
- Notice
  - Notice of permitted use or prohibition
  - Notice to visitors – posting conspicuously
  - Notice to vendors – contracts
  - Policies
  - Registration

# “Safe Care Cam” Program

- On December 22, 2016, Attorney General Christopher Porrino and the Division of Consumer Affairs announced a new program designed to ensure that New Jersey residents who suspect their loved ones are being abused, mistreated, or neglected by unscrupulous home health care providers can have access to micro-surveillance cameras that can be easily hidden to detect abuse and protect patients.
- The *“Safe Care Cam”* Program makes these cameras available for free 30-day loans. To participate in the program, Program participant will be required to do the following:
  - Provide a copy of a driver's license or other official identification.
  - Provide contact information, including phone number, cell phone number, and address.
  - Sign a program contract, which sets forth the rules and obligations under the *“Safe Care Cam”* Program.
- The camera and memory card will be on loan for 30 days. Upon request, this loan can be extended for a longer period of time.



# Conclusions

- Facilities must carefully consider the pros and cons of permitting/prohibiting use of granny cameras
- Facilities are free to prohibit use of granny cameras
- If permitted, usage can be limited in scope
- Do not retaliate if recording is used, with or without permission of facility
- Discharge – Permitted if violations exist and policies are provided to resident/family member
- Privacy concerns for residents, visitors, and employees
- Usage of cameras creates the need for comprehensive policies and adherence to policies
- Check for the law in each jurisdiction you operate and changes in the law

# QUESTIONS OR DISCUSSION